Supreme Court, U.S.
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Nos. 99-466 & 99-500

IN THE

Supreme Court of the United States

CITY OF LOS ANGELES, *et al.*,
Petitioners,

and

AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA,
Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.*

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that the Department of Transportation did not act arbitrarily or capriciously in finding that a component of the landing fee imposed on airlines by respondents City of Los Angeles, *et al.* for use of the Los Angeles International Airport was unreasonable under the Anti-Head Tax Act, 49 U.S.C. § 40116, because it did not correspond to any legitimate aeronautical cost.

PARTIES TO THE PROCEEDINGS AND RULE 26.1 STATEMENTS

In addition to the parties set forth in the petitions for certiorari, the following is a list of additional parties (together with their statements pursuant to S. Ct. R. 26.1) which were intervenors below in support of the United States Department of Transportation, *et al.* and which are respondents in this Court pursuant to S. Ct. R. 12.6:

Air Canada states that it has no parent companies and that there are no publicly held corporations that own 10% or more of its stock.

Air New Zealand Ltd. Airlines states that its parent company is Air New Zealand Limited Group and that there are no other publicly held corporations that own 10% or more of its stock.

Alaska Airlines, Inc. states that its parent company is Alaska Air Group, Inc. and that there are no other publicly held corporations that own 10% or more of its stock.

America West Airlines, Inc. states that its parent company is America West Holdings Corporation and that there are no other publicly held corporations that own 10% or more of its stock.

American Airlines, Inc. states that its parent company is AMR, Inc. and that there are no other publicly held corporations that own 10% or more of its stock.

American Trans Air, Inc. states that its parent company is Amtran, Inc. and that there are no other publicly held corporations that own 10% or more of its stock.

Continental Airlines, Inc. states that it has no parent companies and that Northwest Airlines Corporation owns 10% or more of its stock.

Delta Air Lines, Inc. states that it has no parent companies and that there are no publicly held corporations that own 10% or more of its stock.

Koninklijke Luchtvaart Maatschappij N.V. d/b/a KLM-Royal Dutch Airlines states that it has no parent companies and that there are no publicly held corporations that own 10% or more of its stock.

Compañía Mexicana de Aviación, S.A. de C.V. d/b/a Mexicana Airlines states that its parent company is Corporación Mexicana de Aviacion S.A. de C.V. and that there are no other publicly held corporations that own 10% or more of its stock

Southwest Airlines Co. states that it has no parent companies and that there are no publicly held corporations that own 10% or more of its stock.

Trans World Airlines, Inc. (TWA) states that it has no parent companies and that there are no publicly held corporations that own 10% or more of its stock.

United Airlines, Inc. states that its parent company is UAL Corporation and that there are no other publicly held corporations that own 10% or more of its stock.

United Parcel Service Co. states that its parent company is United Parcel Service, Inc. and that there are no other publicly held corporations that own 10% or more of its stock.

US Airways, Inc. states that its parent company is US Airways Group, Inc. and that there are no other publicly held corporations that own 10% or more of its stock.

Viacao Aerea Rio-Grandense d/b/a Varig Brazilian Airlines states that it has no parent companies and that there are no publicly held corporations that own 10% or more of its stock.

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BRIEF IN OPPOSITION FOR RESPONDENTS AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.*

Respondents Air Transport Association of America, *et al.*—the original complainants in the administrative proceedings below and intervenors in the Court of Appeals—hereby oppose the petitions for certiorari filed in this case by the City of Los Angeles, *et al.* (collectively, "the City") in

No. 99-466 and by the Airports Council International-North America ("ACI") in No. 99-500.[1]

INTRODUCTION

This case meets none of the criteria warranting certiorari. *See* S. Ct. R. 10. It implicates no conflict among the circuits and raises no important unsettled question of law. To the contrary, this case involves an ordinary exercise of agency discretion in determining the reasonableness of a rate subject to federal regulation. Like other similar regulatory statutes, the Anti-Head Tax of 1973 ("AHTA"), codified as amended at 49 U.S.C. § 40116, requires airports to assess only "reasonable" charges on aeronautical users. *See generally Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994) ("*Kent County*"). Pursuant to its expressly delegated authority to implement that statute, the Department of Transportation ("DOT") disallowed a portion of the fees charged by the City for the use of the Los Angeles International Airport ("LAX"). Applying the deferential standard of review this Court has squarely held is applicable to such agency policy determinations, *see id.* at 367, the Court of Appeals denied the City's petition for review, holding that DOT's determination was not arbitrary or capricious.

In a misguided attempt to transform this ordinary administrative rate proceeding into a case worthy of this Court's review, the City and ACI primarily present issues that were not raised below and that are not implicated by this case. For example, they argue that this case conflicts with circuit court decisions involving the standard of review for an agency's interpretation of federal grant agreements. Yet no party

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[1] This brief is filed on behalf of the Air Transport Association of America ("ATA") and the sixteen original complainant airlines listed above at pages ii-iii. A total of 59 airlines eventually participated in the administrative proceedings, and this brief will refer to all of them collectively as the "Airlines." All of the Airlines are now jointly represented in the administrative proceedings below.

raised that argument below—or even cited to those purportedly conflicting cases—because there is no dispute in this case as to the proper interpretation of the City's grants. The City's grants were involved here only to the extent that DOT considered certain unambiguous grant requirements as one factor supporting its determination as to the unreasonableness of the City's fees. Likewise, ACI's petition belatedly presents—for the first time in this case—an issue under the Tenth Amendment that has nothing to do with the rate regulation issues that are the real subject of this case.

Despite petitioners' attempt to manufacture new issues at this late stage of the proceedings, this case involves a straightforward application of the deference which this Court has clearly held is applicable to DOT airport rate determinations. And far from constituting a question of national importance, the underlying issue is unique because no other airport has ever attempted to impose the type of charges which DOT found unreasonable in this case. The petitions should therefore be denied.

COUNTERSTATEMENT

A. The City's New Fees

Federal law has long mandated that airport proprietors receiving federal grants must use all airport revenues only for airport operating and capital costs. *See* 49 U.S.C. § 47107(b). Nevertheless, beginning in the early 1990s, the City openly embarked on a campaign to balance its local budget by assessing new fees on the air traveling and shipping public—fees designed to earn significantly more than necessary to cover the costs of delivering service to those users—and then diverting those excess revenues to general City activities. This publicly-announced plan is fully documented in the record, which contains numerous public statements and actions by City officials evidencing the City's

intent. *See, e.g.*, J.A. 137, 151-153, 154, 155-156, 162-168, 227-229, 230.[2]

The centerpiece of the plan was the development of a new fee methodology expressly designed to create surpluses for eventual diversion. In furtherance of that strategy, the City commissioned a consultant to identify methods of achieving the City's goals. *See* J.A. 161, 187, 202, 212, 213. The consultant recommended that the City replace its residual fee methodology with a new "cost of service" (or "compensatory") methodology that would generate large surpluses. J.A. 216. A compensatory methodology is supposed to set aeronautical user fees at the amount necessary to cover the airport's actual costs of serving those users. *See City of Los Angeles Department of Airports v. DOT*, 103 F.3d 1027, 1029 (D.C. Cir. 1997). The consultant, however, specifically advised the City that it could maximize LAX "discretionary cash flow" (*i.e.*, generate a revenue surplus) if it included in the rate base items such as land rental charges that do not compensate for any out-of-pocket costs. J.A. 225.

The purpose of the new fees was clear. Indeed, the consultant explicitly acknowledged that "[t]he use of airport revenues and the establishment of landing fees are interrelated," J.A. 189, and recommended the adoption of a " 'dividend' policy to transfer 'airport revenues' to the [City's] general fund, notwithstanding the current limitations on such transfers." J.A. 191. The consultant explained that such "dividends" were "nothing more than a transfer to the general fund" that could be calculated in part by "a Land Rent Formula." J.A. 193-194. This proposal was a dramatic departure from traditional airport practices in the United States. As the consultant recognized, LAX "would be the first U.S. airport" to use fair market valuation to set landing fees. J.A. 222; *see also* J.A. 169-170 (hearing testimony).

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[2] "J.A." refers to the Joint Appendix filed below.

The record also demonstrates that the City had no need for these surpluses other than for the proposed diversion. As DOT found, the net income of the City's Department of Airports was $71 million in 1993-94, yielding an operating profit margin of nearly *40%*. J.A. 507. Its retained earnings also increased by more than $100 million in 1993-94, to $825,071,000. *Compare* J.A. 198, *with* J.A. 235; *see* J.A. 157-158. And unaudited financial statements for the first six months of 1994-95 showed an additional $65 million increase in retained earnings. J.A. 260A; J.A. 158-160.

B. The Administrative Proceedings

In 1994, responding to this Court's suggestions that airport rate determinations are best left to the discretion of an expert agency, *see Kent County*, 510 U.S. at 367, Congress enacted 49 U.S.C. § 47129 ("Section 47129"), which established an expedited procedure under which airlines may challenge the reasonableness of airport user fees before DOT. After enactment of the statute, the original complainant airlines (joined later by the other Airlines) filed administrative proceedings challenging the legitimacy of the City's 1993 fees and, thereafter, its 1995 fees.

The Airlines presented more than a hundred documentary exhibits and declarations supporting their complaint. After DOT found there was a "significant dispute" pursuant to Section 47129(c)(2), the matter proceeded to a hearing. Affirming a recommended decision of its Chief Administrative Law Judge, DOT determined (among other things) that the City's land rental charges were unreasonable and therefore invalid because they did not correspond to any valid airport cost.

C. The *LAX I* and *Policy Appeal* Decisions

The City petitioned the Court of Appeals for review of that decision, and in *City of Los Angeles Department of Airports v. DOT*, 103 F.3d 1027 (D.C. Cir. 1997) ("*LAX I*"), the court

remanded the case for further consideration. The court recognized that by adopting a compensatory methodology the City became obligated to set fees based upon "the actual costs to the City of maintaining and operating the airfield and the apron." *Id.* at 1029. But the Court held that DOT had incorrectly determined, as a matter of law, that the governing statutes allowed airports to recover only their out-of-pocket costs, and that DOT therefore had failed even to consider the City's contention that purported lost "opportunity costs" rendered its land rental charges reasonable. Accordingly, the court remanded the case with directions that the agency give "express consideration" to the City's argument that one of its "actual costs" is the "opportunity cost" it experiences by foregoing the value the City could obtain from the airfield land in the best alternative use. *Id.* at 1033-34.

Subsequently, the Court of Appeals ruled on the City's and ATA's petitions for review of DOT's revised Policy Regarding Airport Rates and Charges. *See Air Transport Ass'n of America v. DOT*, 119 F.3d 38 (D.C. Cir.), *amended by*, 129 F.3d 625 (D.C. Cir. 1997) ("*Policy Appeal*"). In ruling on the City's petition, the court held that DOT had not adequately explained its requirement that airports using compensatory methodologies must value land at historic cost. The court, however, concluded that DOT did not "make the same mistake that caused us to reject [its] prior determination that Los Angeles was obliged to use historic cost as the basis for airfield fees"—*i.e.*, that the statute itself required such valuation. *Id.* at 44. In particular, as the court noted, DOT fully addressed the City's opportunity cost argument, "observ[ing] that since airports are obliged to use their property as an airport, the concept of opportunity cost, and therefore fair market value, does not quite fit." *Id.* Even though the City challenged the rationality of this policy judgment, the court did *not* accept the City's arguments on that point. Instead, it faulted DOT for not adequately explaining why

administrative difficulties favored historic cost for airfield fees but not for non-airfield fees. *Id.* at 43-44.

D. The Remand Decision

On remand following *LAX I*, after carefully considering all of the parties' arguments regarding the reasonableness of the land rental charge, DOT issued its final decision. DOT determined that the City incurs no compensable opportunity costs by devoting its airfield land to that use because the City has no current opportunity to use the land for any other purpose, in light of its unambiguous voluntary grant assurances requiring it to use the land as an airport, as well as the practical impossibility of relocating LAX. Pet. App. 38a-44a, 46a-47a.[3]

DOT further determined that, even if the City had such opportunities, it incurs no net opportunity costs (and needs no additional monetary incentives) because it earns substantial monopoly-level profits from its unregulated non-aeronautical activities and because LAX bestows substantial benefits on the City. *Id.* at 39a n.7, 49a-52a. DOT also relied on the fact that LAX, among the many airports that have employed compensatory methodologies, is the *only* airport to have abandoned the universal practice of valuing airfield land at historic cost. *Id.* at 55a-58a. And in rejecting the City's contention that its land rental charge was needed for capital improvements, DOT found that the evidence did not support that contention but rather "suggests that the airport instead may have adopted that formula in order to raise funds that could be diverted off the airport if federal law were changed to allow that diversion of airport revenues." *Id.* at 62a.

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[3] "Pet. App." refers to the Appendix to the Petition in No. 99-466.

E. The Decision Below

The Court of Appeals denied the City's petition for review of the remand decision. The court noted that, unlike in the agency's original decision, in its remand decision DOT "rested its decision explicitly on policy grounds." Pet. App. 6a. The court thus recognized that

> [i]n reviewing the Department's order, we do not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority.

Id. at 10a (citing, *inter alia*, *Kent County*, 510 U.S. at 366-368).

Applying these well-settled principles of agency review, the court concluded that DOT's rejection of the City's "opportunity cost" argument was not arbitrary or capricious. Noting that the City's grant assurances unambiguously require it to maintain LAX as an airport, *see* 49 U.S.C. § 47107(a)(1), (a)(16)(c), and therefore eliminate any current opportunity to use its airfield land for something else, the court held that "we cannot say it was irrational for the Department to treat the grant assurances as a given and evaluate the City's proposed methodology from that perspective." Pet. App. 11a. The court also rejected the City's argument that upholding DOT's remand decision was inconsistent with the court's prior decision in *LAX I*. *Id.* at 12a-13a.

The court likewise rejected ACI's argument that by evaluating the City's opportunity cost argument with reference to the City's unambiguous grant assurances, DOT impermissibly added a new condition to those grants. As the court held, "we do not view the Department's reasoning as adding new conditions to the grant. Rather, the Department focused on a *consequence* of an unambiguously imposed condition—that

the airport would be kept open for public use—that was present from the outset." *Id.* at 13a (emphasis in original).

Finally, the court noted that DOT's decision could also be sustained on the alternative ground that it was reasonable for DOT to conclude that any purported opportunity costs incurred by the City in not using its land as an airport are covered by the enormous (and undisputed) benefits bestowed on the City by using the land for that purpose. *Id.* at 13a-15a. The court rejected the City's contention that by evaluating its opportunity cost argument with reference to these benefits, DOT contravened *Kent County*, *supra*, which holds that an airport employing a compensatory methodology need not cross-credit non-aeronautical revenues against aeronautical costs. *See also* 49 U.S.C. § 47129(a)(2) (permitting airports to use compensatory methodologies). As the court held:

> [T]he Department in no sense adopted a general requirement that airports must credit their non-airfield surpluses toward their airfield costs. The DOT is only taking into account non-airfield revenues, as well as all other economic benefits the City enjoys, in determining whether Los Angeles really has an uncovered opportunity cost. It is the City itself, by using the opportunity costs concept, that has invited the Department to think broadly about how such costs should be measured.

Pet. App. 14a.[4]

The court then denied the City's and ACI's petitions for rehearing and rejected their suggestions for rehearing *en banc*. Two non-panel judges dissented from this order, expressing the view that "another remand to [DOT] seems . . . in order" so that DOT might "resolv[e] other possible

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[4] The court also rejected the City's independent claim that DOT's decision effected an unconstitutional taking of its property. Pet. App. 15a-17a. Neither petition presents that issue for this Court's review.

theories supporting its rejection of opportunity costs." *Id.* at 116a, 115a. Judge Silberman, in an opinion concurring in the denial of rehearing, reiterated the panel's holding that DOT's decision was entitled to deference. But Judge Silberman also noted that, as a purely economic matter, the record evidence did not support the City's contention that "having taken taxpayer money under the condition that it would continue to use LAX as an airport [the City] is legally entitled to charge a significant group of those taxpayers, airline passengers flying in and out of LAX, its opportunity cost based on a nonexistent opportunity . . . ." *Id.* at 111a.

Yet while the dissenting judges (both of whom were on the panel that decided *LAX I*) apparently would have remanded the case yet again, they did not express the view that the decision below conflicted with *LAX I*. Likewise, no judge of the Court of Appeals, or any other court, has in any way intimated that the decision below conflicts with any other decision from any court.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

A. The Court of Appeals Correctly Applied This Court's Longstanding Precedents Governing Review of Administrative Rate Determinations

Six years ago, in its brief to this Court in *Kent County*, the City quite clearly stated its position that "[h]istorically, federal courts have declined to involve themselves in ratemaking" and that "accepted principles of deference to agency interpretation" required that this Court accept what the City understood to be DOT's interpretation of the Anti-Head Tax Act in that case. Brief for City of Los Angeles as Amicus Curiae in Support of Respondents at 12, 14, *Northwest Airlines, Inc. v. County of Kent*, No. 92-97.

This Court adopted that view in *Kent County*. As the Court held:

> Courts . . . are scarcely equipped to oversee, without the initial superintendence of a regulatory agency, rate structures and practices. The Secretary of Transportation is charged with administering the federal aviation laws, including the AHTA. His Department is equipped, as courts are not, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances. If we had the benefit of the Secretary's reasoned decision concerning the AHTA's permission for the charges in question, we would accord that decision substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

510 U.S. at 366-367 (additional citations and footnote omitted).

Likewise, although the decision in *Kent County* (which did not involve review of an agency decision) applied a reasonableness standard derived from Commerce Clause jurisprudence, the Court also made clear that

> [i]t remains open to the Secretary, utilizing his Department's capacity to comprehend the details of airport operations across the country, and the economics of the air transportation industry, to apply some other formula (including one that entails more rigorous scrutiny) for determining whether fees are "reasonable" within the meaning of the AHTA; his exposition will merit judicial approbation so long as it represents "a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

Id. at 368 n.14.[5]

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[5] Subsequently, Congress enacted Section 47129, which established the expedited rate-review procedures that were invoked in this case. Following this Court's guidance, Congress expressly provided that "[a]ny findings of fact in a final order of the Secre-

Thus, *Kent County* clearly sets forth the applicable standard for reviewing DOT decisions regarding the reasonableness of airport rates under the AHTA. As with other such agency decisions, the standard of review is highly deferential. Indeed, because an agency rate decision " 'is essentially a legislative function,' " *Kent County*, 510 U.S. at 366 (quoting *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945)), it has long been recognized that an administrative agency charged with determining the reasonableness of rates "must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

Yet after having itself successfully urged this Court to apply "accepted principles of deference" to DOT decisions regarding the reasonableness of airport rates, *see supra* at 10, the City now contends that "the court of appeals applied an improperly deferential standard of review." City Pet. at 17. In *Kent County*, the City urged a deferential standard of review because it believed that DOT's position was favorable to it in that case, and the Court endorsed that view. The City now takes the opposite view because DOT has not agreed with its position in this case. The application of *Chevron* deference, however, does not turn on which party prevails before the agency.

In an attempt to manufacture an issue for certiorari where none exists, the City and ACI contend that the decision below conflicts with the decisions of other courts addressing the standard of review for an agency interpretation of a federal grant provision. *See* City Pet. at 17-21; ACI Pet. at 15 (citing *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997)); *cf. Doe v. Board of Educ. of Oak Park & River*

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tary . . . if supported by substantial evidence, shall be conclusive if challenged in a court . . . ." 49 U.S.C. § 47129(c)(6).

Forest High Sch. Dist. 200, 115 F.3d 1273 (7th Cir.) (following *Riley* without independent analysis), *cert. denied*, 118 S. Ct. 564 (1997)). The Court of Appeals would undoubtedly be surprised to learn that its decision conflicted with these other circuit court decisions. For neither the City nor ACI ever raised this argument below (either before the panel or on rehearing), neither of them even *cited* to the allegedly conflicting cases, and the Court of Appeals did not address the issue on its own. Accordingly, even if this case involved a question regarding the proper standard for reviewing agency interpretation of grant agreements—which, as explained below, it does not—the issue has been waived.[6]

It is not surprising that the City and ACI did not raise this issue below, for there is no question in this case regarding the proper interpretation of the City's grant agreements. As in *Kent County*, this case involves the application of the general requirement of the AHTA that airports may assess only "reasonable" user fees. 49 U.S.C. § 40116(e)(2). This requirement is *independent* of any grant assurances.[7] The City contended that its land rental fees were reasonable in

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[6] *See, e.g., Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994) ("The issue was not raised below, so we do not address it."); *Heller v. Doe*, 509 U.S. 312, 319 (1993) ("It would be imprudent and unfair to inject a new standard at this stage in the litigation. We therefore decide this case as it has been presented to the courts whose judgments are being reviewed.") (citations omitted); *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990) ("We decline to consider that argument because it was not raised below."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("that question was not raised in the Court of Appeals and is not properly before us").

[7] The City's grant assurances also contain a similar provision requiring it to make its airport available "on fair and reasonable terms." 49 U.S.C. App. § 2210(a)(1) (1988) (since recodified as "reasonable conditions," 49 U.S.C. § 47107(a)(1)). Because the AHTA independently forbids the City from assessing unreasonable fees, the reasonableness requirement contained in this grant assurance has no independent effect in this case.

part because one of its aeronautical costs is the "opportunity cost" it purportedly is incurring by using its airfield land for an airport rather than something else. DOT rejected that argument, finding among other things (1) that the City presently has no legal or practical opportunity to use the land for another purpose, and (2) that the enormous benefits bestowed on the City by LAX more than compensate for any purported lost opportunity costs.

The only relevance of the City's grant agreements in this case involved the effect of *unambiguous* provisions under which the City promised that "the airport will be available for public use," and that it "will not make or allow any alteration in the airport or any of its facilities if the alteration does not comply with the plan the Secretary approves, and the Secretary is of the opinion that the alteration may affect adversely the safety, utility, or efficiency of the airport." 49 U.S.C. § 47107(a)(1), (16)(C). *See also id.* § 47107(a)(8) ("a proposal to close the airport temporarily for a nonaeronautical purpose must first be approved by the Secretary"). There has never been a dispute in this case that "[t]hese provisions forbid the City from converting the airfield land to rental property." Pet. App. 6a.[8]

DOT simply referred to the *effect* of these unambiguous provisions as one of many reasons for rejecting the City's opportunity cost defense to the unreasonableness of its fees. As the grant assurances unambiguously provide, the City has no legal right to use its airfield land for any other purpose. It therefore follows logically that the City is presently incurring

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[8] In a footnote to its petition, the City makes the conclusory assertion that these provisions do not unambiguously impose a continuing duty to keep LAX in operation. City Pet. at 22 n.18. The City did not raise this argument at any point below, doubtless because the argument flatly contradicts the statutory language. Indeed, the City's own intervenor, ACI, notes that "Los Angeles agreed to operate LAX as an airport for a period of years (and thus to forego alternative uses of the land) . . . ." ACI Pet. at 18.

no compensable opportunity costs because the land is being devoted to its only permissible use. Or, as the Court of Appeals put it, "the City is like an owner of a hot dog stand who claims his opportunity cost is the revenue he would earn selling cocaine rather than hot dogs." Pet. App. 9a.[9]

Thus, this case does not involve any question about the interpretation of the City's grants, much less the proper standard of review applicable to such interpretations. As the Court of Appeals properly held, DOT's reasonableness determination did not add new conditions to, or misinterpret, the City's grants, but rather simply "focused on a *consequence* of an unambiguously imposed condition—that the airport would be kept open for public use—that was present from the outset." Pet. App. 13a (emphasis in original). There is no reason why DOT could not take into account the effect of an *unambiguous* grant provision—or any other legal

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[9] It should be noted that while the City and ACI belatedly—and wrongly—complain about the standard of review employed by the Court of Appeals, neither asks this Court to review the court's holding that DOT's reasonableness determination passed muster under the deferential standard mandated by *Chevron* and *Kent County*. That issue has long since been settled. This Court held long ago in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), that an agency has the discretion to employ historic cost valuation in determining the reasonableness of rates. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989) ("In *Hope* we ruled that historical cost was a valid basis on which to calculate utility compensation."). Under these precedents, DOT did not exceed its considerable discretion in rejecting the City's attempt to use purported "opportunity costs" to overturn the nearly universal agency preference for historic cost valuation that has prevailed since *Hope*. For even if the City may once have had an opportunity to use the LAX land for something else when the airport was constructed many decades ago, it clearly has none now. And the City's entirely *voluntary* decision to devote its land to airport use had nothing to do with the airlines which the City attempted to charge for these non-existent opportunity costs. It was therefore entirely reasonable for DOT to conclude that the City is not now incurring any ongoing, compensable opportunity costs by continuing to use LAX as an airport.

requirement—as one of many factors contributing to its informed policy judgment regarding the reasonableness of an airport rate. Indeed, even if DOT had ignored the effect of this grant assurance, it would have reached the same conclusion based on undisputed evidence that the City has no practical opportunity to relocate LAX. *See* Pet. App. 47a & n.13.

In sum, this Court has squarely held that DOT, like other agencies charged with determining the reasonableness of rates, has wide discretion in carrying out its delegated responsibility under the AHTA, and that the courts must accord its decisions substantial deference. Applying these well-settled standards, the Court of Appeals determined that DOT exercised its discretion in an appropriate manner. There is nothing about this typical rate case which remotely warrants this Court's intervention.

B. There is No Intracircuit Conflict

ACI (but not the City) urges the Court to resolve what it characterizes as an "intracircuit conflict" between the decision below and *LAX I*. *See* ACI Pet. at 13. There is no such conflict. The court in *LAX I* quite clearly held that "[h]istoric cost is, to be sure, one permissible measure of costs in cost-of-service ratemaking." Pet. App. 88a-89a. But because DOT had incorrectly determined, as a matter of law, that the governing statutes allowed airports to recover only their out-of-pocket costs, the panel remanded the case so that DOT could give "express consideration" to the City's opportunity cost argument. *Id.* at 93a. DOT followed those instructions faithfully, fully considering the issue for the first time on remand, and, in the decision below, the Court of Appeals upheld DOT's determination as a reasonable exercise of its policy judgment. *See also Policy Appeal*, 119 F.3d at 44.

In any event, as Justice Harlan once noted, "contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since

such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Hon. John M. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958).[10] The *en banc* process is the means of identifying and settling any intracircuit conflicts. Indeed, the absence of such a conflict in this case is demonstrated by the fact that no judge of the Court of Appeals—even the two who voted in favor of rehearing—identified such a conflict. Although those two judges believed the case should be remanded yet again for further consideration of the City's opportunity cost argument, neither of them in any way intimated that the decision below conflicted with *LAX I*. They did not do so because *LAX I* had simply remanded the case for consideration, as a matter of policy, of an argument that DOT had initially failed to consider.[11]

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[10] *See Davis v. United States*, 417 U.S. 333, 340 (1974) (noting denial of petition presenting intracircuit conflict); Robert L. Stern, *et al.*, *Supreme Court Practice* 176 (7th ed. 1993) ("Ordinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari.").

[11] ACI cites two cases in which the Court identified an intracircuit conflict in granting review, *see* ACI Pet. at 13 n.10, but both cases involved exceptional circumstances not presented here. In *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950), the Court reviewed a Second Circuit decision—rendered when *en banc* review was apparently unavailable in that court—adhering to the holding of an earlier decision with which the later panel unanimously disagreed. *See Lopinsky v. Hertz Drive-Ur-Self Sys., Inc.*, 194 F.2d 422, 429 (2d Cir. 1951) (Clark, J. concurring) (noting "the practice of this circuit never to sit in banc"). And in *Maggio v. Zeitz*, 333 U.S. 56 (1948), the Court reviewed another Second Circuit decision rendered during that same period, in light of that court's numerous conflicting decisions on the precise issue and its pre-eminent role in bankruptcy law at the time. *Id.* at 59-60. Here, by contrast, no judge of the Court of Appeals expressed disagreement with *LAX I*, and *en banc* review was available to resolve definitively any intra-circuit differences.

II. THIS CASE INVOLVES NO UNSETTLED ISSUE OF FEDERAL LAW

A. The Decision Below Does Not Conflict With This Court's Decision in *Kent County*

The City contends that the Court of Appeals' decision conflicts with this Court's holding in *Kent County* that the AHTA does not preclude an airport from establishing a "compensatory" methodology under which aeronautical users are charged for their share of airport costs without credit for surpluses that the airport may earn from unregulated non-aeronautical users such as concessionaires. *See* City Pet. at 25-29; *cf.* ACI Pet. at 19 (describing *Kent County* as addressing "similar" issue). This contention is baseless.

As the Court of Appeals correctly held, DOT "in no sense adopted a requirement that airports must credit their non-airfield surpluses toward their airfield costs." Pet. App. 14a. Quite to the contrary, DOT clearly held that the Airlines were required to pay for their share of *all* legitimate airport costs. *See* Pet. App. 51a ("we are not using the City's benefits to offset the City's other airfield costs"). As the Court of Appeals noted, DOT merely referred to non-aeronautical surpluses, as well as the enormous economic benefit LAX bestows on the City, as additional reasons for rejecting the City's contention that one of its "costs" is the purported opportunity cost it presently incurs by not using its airfield land for something other than an airport. *See* Pet. App. 14a ("The DOT is only taking into account non-airfield revenues, as well as all other economic benefits the City enjoys, in determining whether Los Angeles really has an uncovered opportunity cost."); *see also id.* at 51a-52.

The City has defended its fees with the contention that it is incurring enormous *costs*—which the Airlines must pay for—because it is not devoting its airfield land to some other use. Nothing in *Kent County* prevented DOT, in evaluating that argument, from considering evidence that the City is in

fact reaping enormous *benefits* from using its land in that manner. As the Court of Appeals put it,

> [i]t is the City itself, by using the opportunity costs concept, that has invited the Department to think broadly about how such costs should be measured. And we cannot hold that it was unreasonable for the DOT, when faced with a demand for economic analysis, to consider factors that an economist might take into account.

Pet. App. 14a-15a.

Contrary to ACI's preposterous suggestion, *see* ACI Pet. at 18, 20, such an analysis did not in this case—and could not ever—lead to airlines being charged nothing for their use of an airport. Airlines will continue to pay their share of all legitimate airport costs; DOT simply determined in this case that it was unreasonable for the City to charge the Airlines for non-existent "opportunity costs," thereby adding to its mounting surpluses available for unlawful diversion.

B. ACI's Tenth Amendment Argument Has Been Waived and is Frivolous

In its petition, ACI raises—for the first time in this five-year-long litigation—the contention that the decision below violates the Tenth Amendment and principles of "comity and federalism." *See* ACI Pet. at 21-23. The issue—which the City properly does not raise—was neither raised below nor considered by DOT or the Court of Appeals. The question is therefore not properly before the Court. *See* cases cited *supra* note 6.

But in any event, the issue is frivolous. The AHTA in no way " 'commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' " *New York v. United States*, 505 U.S. 144, 176 (1992) (citation omitted). Like other similar regulatory statutes enacted pursuant to Congress' Commerce Clause power, the AHTA prohibits airports from imposing

unreasonable fees on aeronautical users. The AHTA was prompted by Congress' concern that permitting airports (all of which happen to be owned by state and local governments) to assess unreasonable fees would result in "a proliferation of local taxes burdensome to interstate air transportation." *Kent County*, 510 U.S. at 363 (discussing legislative history). The AHTA alleviates this burden on interstate commerce by pre-empting unreasonable fees imposed by state and local governments in their capacities as airport operators. Nothing about the AHTA or its implementation by DOT even remotely raises a concern about "commandeering" state legislative processes to enact or enforce a federal regulatory program.

III. THIS CASE INVOLVES NO RECURRING ISSUE OF NATIONAL IMPORTANCE

The record in this case is clear that of the more than 500 public commercial service airports in the Nation, only *one*—LAX—has *ever* attempted to set landing fees based on the purported fair market value of airfield land. Every other airport employing a compensatory methodology has based its fees instead on the historic cost of that land—a methodology approved by this Court in *Hope Natural Gas* and almost universally employed by regulatory agencies. *See, e.g.*, 18 C.F.R. Part 201 at 507 (definition 9), 522 (instruction 7) (1999) (FERC requirement that land comprising gas plants be valued at historic cost); Charles F. Phillips, Jr., *The Regulation of Public Utilities: Theory and Practice* 350 (1993) (utility commissions generally value land at historic cost); *see also supra* note 9.

Indeed, the expert who devised the City's own fees stated at the time that "fair market" valuation had never been used before at U.S. airports to set landing fees, and LAX therefore "would be the first U.S. airport to do so." J.A. 222. *See also* J.A. 169-170 (hearing testimony). Thus, DOT expressly recognized the "undisputed fact that no other U.S. airport

calculates its landing fees on the basis of the fair market value of its airfield land, as shown by the record." Pet. App. 56a-57a. *See also* J.A. 506 (finding in initial decision that "historic cost has been the measure universally used by airports for valuing airfield land"). Even after the City imposed its new fees, no other airport followed suit.

This case therefore involves an isolated, unrepeated dispute between a single airport and the airlines serving it. That dispute was fostered by the City's attempt to generate enormous surpluses—over and above the actual capital and operating costs of LAX—available for possible diversion to pay general City expenses. Without the City's express policy of seeking to divert revenues whenever possible, there would have been little incentive for it to impose land rental charges whose only purpose is to generate such surpluses. *See* J.A. 189 (statement of City's expert that "[t]he use of airport revenues and the establishment of landing fees are interrelated"). No other airport operator has been as brazen in its desire to divert revenues, and none has sought to impose these charges. Moreover, DOT is presently considering, but has not yet promulgated, rules addressing this and related issues on a nationwide basis. *See* Pet. App. 8a; 63 Fed. Reg. 43,228 (1998). Thus, even if this case presented an important, unsettled issue of federal law—and it does not—there would be no cause for the Court to devote its scarce resources to resolving this unique dispute.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

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